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2 UNITED STATES DISTRICT COURT  
3 DISTRICT OF MASSACHUSETTS

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5 IN RE: NEW ENGLAND COMPOUNDING ) MDL NO. 13-02419-FDS  
6 PHARMACY CASES LITIGATION )  
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17 BEFORE: THE HONORABLE JENNIFER C. BOAL  
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20 **MOTION TO QUASH**  
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22  
23 John Joseph Moakley United States Courthouse  
24 Courtroom No. 17  
25 One Courthouse Way  
Boston, MA 02210

February 6, 2014  
10:00 a.m.

26  
27 Catherine A. Handel, RPR-CM, CRR  
28 Official Court Reporter  
29 John Joseph Moakley United States Courthouse  
30 One Courthouse Way, Room 5205  
31 Boston, MA 02210  
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## P R O C E E D I N G S

(The following proceedings were held in open court before the Honorable Jennifer C. Boal, United States Magistrate Judge, United States District Court, District of Massachusetts, at the John J. Moakley United States Courthouse, 1 Courthouse Way, Boston, Massachusetts, on February 6, 2014.)

COURTROOM DEPUTY CLERK YORK: You may be seated.

Today is February 6, 2014. We're on the record in the matter of New England Compounding Pharmacy, Incorporated, Case No. 13-MD-2419.

Will counsel for the plaintiffs' steering committee please identify yourself for the record and all parties after that.

MS. PARKER: Good morning, your Honor. Kristen Johnson Parker of Hagens Berman Sobol Shapiro for the plaintiffs' steering committee.

MR. STRANCH: Good morning, your Honor. Gerard Stranch of Branstetter, Stranch & Jennings on behalf of the plaintiffs' steering committee.

MR. CHALOS: Good morning, your Honor. Mark Chalos on behalf of the plaintiffs.

MR. LIPTON: Marc Lipton, your Honor.

MR. FENNEL: Patrick Fennell from Crandall & Katt for plaintiffs' steering committee.

MR. GASTEL: Ben Gastel from Branstetter, Stranch &

1 Jennings for plaintiffs' steering committee.

2 MS. DOUGHERTY: Good morning, your Honor. Kim  
3 Dougherty from Janet Jenner & Suggs, on behalf of plaintiffs'  
4 steering committee.

5 MR. ZAMORA: Good morning, Judge. Mark Zamora.

6 MR. REHNQUIST: Jim Rehnquist, Goodwin Procter, for  
7 Unifirst.

8 MR. LAUNER: Good morning, your Honor. Josh Launer  
9 from Goodwin Procter, for defendant Unifirst.

10 MS. DORMAN: Good morning, your Honor. Nicole Dorman  
11 from Rose Kallor for Liberty Industries.

12 MS. LUCY: Good morning, your Honor. I'm Jeannette  
13 Lucy and I represent Travelers Property Casualty Company of  
14 America.

15 MS. KELLY: Good morning, your Honor. Sarah Kelly  
16 for the St. Thomas entities.

17 MR. COREN: Good morning, your Honor. Michael Coren,  
18 co-chair, official creditors' committee. I also am here in an  
19 individual capacity representing New Jersey and Ohio victims.

20 MR. NOLAN: Good morning. I'm George Nolan from  
21 Nashville and we represent certain plaintiffs.

22 MR. BLUMBERG: Jay Blumberg from the Law Office of  
23 Jay Blumberg on behalf of the Premiere defendants.

24 MR. ABELN: Anthony Abeln on behalf of BKC.

25 MR. CONNORS: Matthew Connors, your Honor, on behalf

1 of Ocean State Pain Management.

2 THE COURT: All right. Anyone else in the courtroom  
3 wish to identify themselves?

4 (No response.)

5 THE COURT: All right. I understand we have a number  
6 of people on the phone as well. So, good morning everyone. I  
7 appreciate that so many of you are here despite the snowstorm  
8 yesterday and I completely understand why others of you were  
9 only able to appear by phone.

10 Because there are individuals on the phone, as we've  
11 done before, if you're speaking, I would just ask if you could  
12 pull the microphone towards you and you may stay seated. I  
13 find that's usually a better way to transmit as loudly as we  
14 can over the microphone.

15 If you don't have a microphone -- I believe, Mr.  
16 York -- is the microphone at the podium working?

17 COURTROOM DEPUTY CLERK YORK: Yes.

18 THE COURT: I would just ask that you go to the  
19 podium if you wish to speak.

20 So, I'm first going to hear the motions to quash  
21 filed by Travelers and Liberty and I will hear from those  
22 parties first.

23 MS. HUMPHREY: Your Honor, this is Kathy Humphrey on  
24 the phone and I just want to bring to the Court's attention  
25 that we were aware that people were making introductions, but

1 we heard two voices and mostly silence. So, if you would be  
2 kind enough before the arguments start full swing to just do a  
3 sound check for those of us on the phone, we would be  
4 grateful.

5 THE COURT: I believe I just -- did you hear when I  
6 -- well, this will be a good check. Did you hear when I asked  
7 people to speak into the microphone?

8 MS. HUMPHREY: Yes, we did hear that. You are loud  
9 and clear.

10 THE COURT: All right. Well, hopefully, my  
11 suggestion will help you hear going forward, because it didn't  
12 make sense for purposes of the introduction to have everyone  
13 go to a microphone, but hopefully going forward you will be  
14 able to hear everyone.

15 So, I will hear from -- is it Travelers first?

16 MS. LUCY: I believe so, your Honor.

17 Can everyone hear me?

18 MS. HUMPHREY: Yes, that's good. Thank you.

19 MS. LUCY: Okay. Good. Your Honor, thank you.

20 Travelers Property Casualty Insurance Company of  
21 America is a non-party, as the Court knows, to this  
22 litigation. It has been served with a Rule 45 subpoena with  
23 four categories of documents sought.

24 We filed a motion to quash the subpoena on the basis  
25 that it is overly broad, seeks the discovery of information



1 not reasonably calculated to lead to the discovery of  
2 admissible evidence and could be unduly burdensome and  
3 onerous. I wanted to take the Court through some of the  
4 arguments that my brothers have made on the PSC side as well  
5 as our arguments.

6 As the Court knows, the injuries and deaths that  
7 occurred in this lawsuit happened during the timeframe of May  
8 21st, 2012 and September 24th, 2012.

9 THE COURT: But my understanding is that the PSC --  
10 and as far as I know, these haven't been dismissed in any  
11 way -- have made allegations against Liberty that go back to  
12 2005.

13 MS. LUCY: That may well be, your Honor. We are not  
14 privy to everything that's been going on in this lawsuit. We  
15 have some of the information, and I am going to address some  
16 of that to hopefully narrow the issue for the Court to rule on.

17 Travelers today -- so, the injuries occurred during  
18 that timeframe. Travelers over the timeframe of May 2005,  
19 2006 through November of 2010 at various points in time, not  
20 continuously, issued insurance policies to Liberty. These  
21 policies covered different things and they're not for all of  
22 Liberty's practices, but they're piecemeal policies.

23 Travelers has produced the one policy that would have  
24 been closest in time to the injuries alleged in this lawsuit.  
25 So, it's my understanding we've already produced a copy of the

1 policy and the letter cancelling the policy for the policy  
2 period of November 1st, 2010, which was supposed to run  
3 November 1st, 2010 through November 1st, 2011. The  
4 cancellation notice was sent, I believe, on January 20th,  
5 2011, with the reasons stated and all of the parties, as I  
6 understand it, have seen that.

7           The policy, your Honor, was an occurrence policy.  
8 So, it provided coverage if there was an injury or a death  
9 that happened during the policy period. That is conceded by  
10 the plaintiffs if you look at their memorandum submitted.  
11 They've had an opportunity to read it. Quite clearly, there  
12 was absolutely no coverage for the claims asserted in this  
13 lawsuit even if that policy had not been cancelled.

14           So, the timeframe of the policy was -- if it stayed  
15 fully in effect would have been November to November, 2010 to  
16 2011. It was an occurrence policy, injury policy, and that's  
17 the language.

18           All of the deaths and the injuries in this case, your  
19 Honor, not to say it lightly, but those all happened in 2012  
20 and that was really the reason I mentioned it. It has to do  
21 with the type of insurance coverage that is mentioned.

22           Travelers is a non-party, doesn't have any issue  
23 other than whether or not there's coverage in this litigation  
24 initially, and it's uncontested by Liberty that the  
25 cancellation was proper and there was no policy in effect at

1 the time of the injuries and the deaths alleged.

2 Plaintiffs have said that, Gee, they would like to  
3 see what the other policies were, what's the language in the  
4 other policies. So, perhaps they can determine if there would  
5 be any argument that they could make that the coverage would  
6 be applicable for any type of claims they might conjure or  
7 come up with against Liberty, and we initially resisted that  
8 saying that there are occurrence policies, but we can  
9 certainly understand that the PSC would like to see the  
10 insurance policies that Travelers issued during that  
11 timeframe. So, they're not continuous. I think there's some  
12 here, some there.

13 So, we would be willing to produce, your Honor, the  
14 policies that Travelers issued during that timeframe, I think  
15 of 2005, or it could have been 2006, through the 2010, 2011,  
16 and that will enable the parties to satisfy themselves as to  
17 whether or not there's any potential argument that they might  
18 make that Travelers could be on the hook or could have an  
19 obligation to provide coverage for the claims that they're  
20 asserting or may try to assert in this litigation.

21 So, my understanding is, your Honor, they're all  
22 occurrence. That since the injuries and the deaths didn't  
23 occur until long afterwards until 2012, none of them will be  
24 applicable, but we are willing to produce those policies.

25 And in the memorandum they say, Gee, we would like to

1 see, you know, is that language there. And so, this should  
2 satisfy that desire and that goal. So they can know is there  
3 any coverage or not.

4 We think, though, that what they're doing is a much  
5 -- they're going into a fishing expedition and it's much  
6 broader than is there any insurance coverage and they're  
7 attempting to get into areas that have nothing to do with  
8 claims against Liberty and are well beyond that.

9 The Court probably knows there have been decisions  
10 issued in this case. There was a decision November of 2013  
11 talking about 90 subpoenas that PSC issued and the language  
12 was viewed overbroad and, in particular, the Court found that  
13 the language related was overbroad or ambiguous and kind of  
14 struck that language out and said, You don't get to do this,  
15 and it has to be calculated to lead to the discovery of  
16 admissible evidence.

17 In addition to that order, it's my understanding that  
18 the parties have entered into a mediation conference and that  
19 there is a preliminary order issued in the mediation agreement  
20 and that under that order -- it's Section H2, Subset A, which  
21 talks about informal discovery, what types of discovery are  
22 relevant and should be done.

23 And the insurance policies that they discuss there,  
24 if I recall correctly, are policies for the timeframe of 2012-  
25 2013, and that is for non-party insurance -- for insurance

1 policies that could potentially cover any of the parties  
2 involved in this litigation as potential defendants or  
3 defendant targets.

4           So, what they're asking in this litigation, it's our  
5 position, they're asking for much more than that. They're  
6 going beyond the mediation order. They're going beyond the  
7 order that talked about narrowing it down, and they're not  
8 just looking to coverage. They're trying to get -- they're on  
9 a fishing expedition attempting to trawl through Travelers'  
10 files and see if they can find anything that might be helpful  
11 to them.

12           There is no claim, your Honor, that there was  
13 anything ongoing in -- that there was any contamination, I  
14 believe, in 2005 or six, or whatever. There's no indication  
15 of any policy issue or concern from 2005 through -- we'll go  
16 up to 2010. They say -- one of the things they say is, Well,  
17 we would like to know about this abrupt, as they call it,  
18 cancellation by Travelers of the policy that was issued in  
19 November 1 of 2010 and cancelled about two months later, two  
20 and a half months later.

21           So, that's the other argument they make as to why  
22 maybe it's relevant that they impose the subpoena on a non-  
23 party and try to discover documents. So, they say they're  
24 looking for the reasons that that policy was cancelled.

25           I would submit to the Court that since the policy is

1 an occurrence policy, that the policy did not apply at the  
2 timeframe of the injuries in this lawsuit, that the reasons  
3 for Travelers' business decision to cancel that insurance are  
4 not really relevant.

5 THE COURT: But aren't they entitled to probe that?  
6 Isn't it designed or calculated to lead to the discovery of  
7 admissible evidence?

8 MS. LUCY: I suppose, your Honor, you could argue  
9 that, and I can see that -- why they would have a desire to  
10 see that and anything else, but I would think that, your  
11 Honor, all right, if you were to say that maybe they should  
12 probe that, that that's all they should be probing, that  
13 that's it, that there's no indictment of any prior cancellation  
14 or any prior issues. The coverage had been on and off for  
15 years.

16 I understand Liberty has another insurer that may be  
17 providing a defense in this case and that, if you will --  
18 while I would say that it's not relevant, that I could say  
19 perhaps the Court should -- if you're going to expand the  
20 mediation order, should limit it to what were the reasons or  
21 what's the documents related to the -- what are the documents  
22 related to the cancellation of the policy that was cancelled  
23 well -- a year -- a year before -- more than a year before the  
24 injuries in this lawsuit.

25 So, that's what we're suggesting, your Honor. We,

1 quite frankly, think that that's -- that while there's -- that  
2 that would be appropriate, that that would be reasonable, that  
3 that should address the issues that they say they have and  
4 also prevent us from having to go into an overbroad fishing  
5 expedition, digging into our files, trying to see if there's  
6 any other possible basis for anything that they might to try  
7 to come up with in this litigation, and that that's just not  
8 simply -- what they're trying to do is not appropriate  
9 discovery. So, those are my suggestions. And thank you very  
10 much.

11 THE COURT: Thank you. All right. Counsel for  
12 Liberty.

13 MS. DORMAN: While Attorney Lucy has touched upon  
14 many of the broader points associated with the PSC's subpoena  
15 to Travelers, Liberty's concern arises from the way that the  
16 subpoena really very much morphed in the process of the meet-  
17 and-confer process.

18 When we received the Liberty -- the subpoena directed  
19 to Travelers, there were four categories of documents that  
20 were related. Travelers objected on the basis that have been  
21 just touched upon, but then in January, which, admittedly, was  
22 well beyond the 14 days required for filing of a motion to  
23 dismiss, we received notice that the PSC was now going full  
24 bore after all policy documents and all documentation relating  
25 to why this policy was cancelled in November of 2010, two

1 years before the outbreak and at least five years after  
2 Liberty last did any work at NECC. And the reasons that were  
3 given in this form cancellation notice related to the way that  
4 catalog products were represented in Liberty's catalog  
5 listings in 2010.

6 For our part, those have absolutely nothing to do  
7 with how Liberty constructed or designed clean rooms back in  
8 2005 and 2006 and -- but -- and, you know, I know that the  
9 familiar refrain is "fishing expedition," but it is just that,  
10 and particularly since we learned earlier this week in  
11 connection with the preliminary discussions for the Court-  
12 ordered mediation, which Liberty has opted to participate in,  
13 given its total lack of resources, that the PSC has yet to be  
14 even able to tell us which clean room was allegedly defective  
15 and what the theory of causation is.

16 So, all the more reason that the expansion of the  
17 original motion -- subpoena served upon Travelers is really  
18 inappropriate and should be quashed. It should not be  
19 enforced as the PSC is seeking to enforce it.

20 THE COURT: All right. Thank you.

21 Counsel for the PSC.

22 MR. LIPTON: Over here, your Honor. Marc Lipton on  
23 behalf of the PSC.

24 So, we are here to talk about two issues, and what I  
25 heard was that Travelers now has agreed to produce all



1 insurance policies that they have for Liberty, which today I  
2 learned for the first time are more than just the two that we  
3 talk about in the motion.

4           So, I would just point out to the Court that there  
5 wasn't a meet-and-confer process between December and today.  
6 So, eight weeks, thereabouts. And throughout that time we  
7 were told they would not produce those documents. To hear  
8 this morning for the first time that they will is great. I  
9 would ask the Court to enter an order requiring their  
10 production within five days, should be reasonable, I would  
11 think, but I -- as you can see, this whole process is getting  
12 dragged out and we would like that -- a deadline put in. So,  
13 good faith being what it is, I still want to have that  
14 deadline.

15           The second issue is the alleged overbreadth of our  
16 requests. I heard that counsel for Travelers now concedes  
17 that she could understand why we might want that information.  
18 And so, again, it sort of sounds like a concession that she's  
19 willing to produce it. I don't think there's a whole lot of  
20 detailed analysis that goes on here.

21           The second reason by Travelers terminated the policy  
22 was because supervision and monitoring the clean room  
23 construction could become a professional liability itself if  
24 constructed improperly, which are the allegations against  
25 Liberty in this case. We're not really looking for the

1 internal deliberations of Travelers. We are looking for the  
2 facts and circumstances that led to the cancellation that we  
3 know of and any other cancellations that apparently may have  
4 gone on that we don't know of. So, we want those documents.

5 When somebody comes to the Court and argues that a  
6 subpoena is overbroad or burdensome, they usually have an  
7 obligation to come forward with some evidence of that.

8 There's nothing here. There's no affidavit. There's no  
9 description of why it is too hard for Travelers to open its  
10 files, go on the computer, hit "Liberty" and print the  
11 documents.

12 And then as far as -- there's a couple of things they  
13 threw in there that I think are equally meritless. The  
14 mediation program is designed to -- and the order is designed  
15 to limit the PSC's responsibility and Liberty's responsibility  
16 to produce documents. It's got nothing to do with third  
17 parties. Liberty has a right to go after its own third  
18 parties through the process and give us notice and get  
19 records, just like we do. So, Travelers is not protected by  
20 that.

21 You know, Liberty's argument that they would be  
22 prejudiced by the production of this material is precisely the  
23 point and, as we learn in law school, prejudice is not a  
24 reason not to produce discoverable material. That's what  
25 we're looking for, is prejudicial information that gives us a

1 reason to pursue our claims against them.

2 So, you know, beyond that, I don't think I have a  
3 whole lot to add. I think this is a pretty simple motion and  
4 I would just request that the Court, if it needs to wait until  
5 it issues a written opinion, that it put a shorter timeline in  
6 the production of documents and if it's going to issue an  
7 opinion from the bench, that it give a short but reasonable  
8 time for Travelers to produce the information so that we can  
9 move forward.

10 THE COURT: All right. Anything further from  
11 Travelers or Liberty?

12 MS. LUCY: Yes, your Honor.

13 I am here today filling in for another attorney who  
14 handled this.

15 And, first of all, if Mr. Lipton formed the  
16 impression that I said that there were more than two policies,  
17 I did not intend to say that. I said there were various  
18 policies, I understood, over the timeframe. I'm not  
19 representing how many because I certainly don't know for sure,  
20 your Honor.

21 Secondly -- but I did talk about the 2005 through  
22 2012.

23 Secondly, I spoke with Mr. Cullen before coming here  
24 this morning and he did tell me he had a conversation with  
25 PSC's counsel and did offer to produce the other policies. I

1 was not a party to that discussion. I cannot say if it  
2 happened. That's my understanding.

3 Thirdly, overbreadth, your Honor. The documents --  
4 it is overbroad and there is a concern on that and trying to  
5 determine what's related to and what's not related to is a  
6 problem, and underwriting files are not all on a computer  
7 where you can push a button. So, if that were the case, it  
8 wouldn't be unduly burdensome to try to make sure we complied  
9 with the order. So, that is an issue.

10 And I would ask that if the Court -- since,  
11 obviously, we are agreeing to produce the policies, just maybe  
12 give us a little more than five days, maybe ten days, I think  
13 that would be good, to make sure we have the complete  
14 policies, because policies need to be requested. It's usually  
15 a two-week timeframe, I believe, and to get a certified  
16 policy, that's usually what it takes.

17 With respect to documentation, I'd ask if the Court  
18 clearly -- if you're going to enter an order, clearly order  
19 that the documentation -- the additional documentation that  
20 we're to produce pertains to that cancellation, the 2010-2011  
21 policy, so that we can be certain that we are in compliance  
22 with the order. Thank you.

23 THE COURT: All right. I'm going to take that under  
24 advisement, and we'll move on to the plaintiff fact sheets,  
25 and I'll hear from the PSC first. And it sounded as if the

1 parties were going to continue to negotiate these issues since  
2 the filing of the profile forms on this issue.

3 MR. STRANCH: Your Honor, we've reached an impasse on  
4 the plaintiff profile forms, the fact sheets, depending on how  
5 you want to characterize the document. We're kind of at that  
6 point.

7 There's a comedian in the South who speaks to legal  
8 communities and we're at the point where we need you to "shoot  
9 up here amongst us," your Honor, so that we can -- one of us  
10 can get some relief and we can move this case forward.

11 This is one of the stumbling blocks that's stopping  
12 us from moving this case into the discovery phase and we need  
13 to move that. *Granuflo* that was only sent here a couple of  
14 months ago, it's already taking depositions next week. We  
15 still don't have document productions. We need to move this  
16 case.

17 We've offered a profile form that we believe provides  
18 more information than is necessary to make Bellwether  
19 selections for cases that then undergo full discovery. So,  
20 this is not you have to pick this case and that case will be  
21 tried. This is just to pick a group of cases that will then  
22 undergo full discovery and then from that pool, the trial  
23 cases will be picked. And so, you don't need the same level  
24 of information, pick a case that will absolutely be tried.

25 As an example, in the *Granuflo* case, which is also

1 here in this district, their profile form is four pages, you  
2 know. It's simple. You don't need a lot -- you need enough  
3 census data to characterize the claims so that you can see is  
4 this a death case, is this an infection case, is this a fungal  
5 meningitis case or is this an exposure only slash fear case.

6 I think if the Court -- before I go into our  
7 plaintiff profile forms, does the Court have any specific  
8 questions about our forms that I could address that could  
9 speed this process?

10 THE COURT: I do. So, for example, I believe that  
11 the PSC does not have a question relating to loss of  
12 consortium. Or do I misunderstand this? I think they don't  
13 believe -- if I read the form correctly, that the plaintiffs'  
14 form does not ask for any identifying information about the  
15 spouse or family member, and I was wondering if there was a  
16 loss of consortium claim, why that would not be appropriate  
17 for being in the form.

18 MR. STRANCH: Your Honor, we do have questions about  
19 people's familial relationships, whether they have children,  
20 whether they have a spouse.

21 THE COURT: All right. It doesn't have any  
22 identifying information; is that correct? Or --

23 MR. STRANCH: It asks the name of your spouse, the  
24 date of your marriage, for each of your children list their  
25 names and ages. You know, it's -- there is some information

1 about it, but, more importantly, your Honor, complaints are  
2 already on file for each one of these people that detail those  
3 allegations, you know. And so, they say, I'm making a loss of  
4 consortium claim for, and then it explains it within the  
5 complaint. And so, that information is already out there.

6 One of the kind of issues we're having is a lot of  
7 this information is already available. One of the complaints  
8 that the defendants raise here are that we don't give them the  
9 last four digits of the Social Security number so that they  
10 can get records. Well, if you go look at the medical  
11 authorizations on there, when they sign it, they're supposed  
12 to fill in the last four of their Social.

13 There's a complaint that there's not a date of birth  
14 on the form. On each of the releases there is a place where  
15 you fill in, here's the date of birth of the person releasing  
16 the records so that the records can be found easily. So, the  
17 information is there. It just may not be in the form  
18 specifically where they want it.

19 And we're trying to lessen the burden because there's  
20 a lot of cases in the MDL. There's limited funds with most of  
21 these defendants. And, frankly, all 85 cases or 100 cases or  
22 500 cases are probably not going to be tried at once. And so,  
23 instead of having people spend thousands of dollars and  
24 attorney's time and in fees and expenses, you know, trying to  
25 get this information, collecting it for medical records, it's

1 there.

2 THE COURT: All right. And then perhaps I've misread  
3 this one as well, but it seemed to me that the plaintiffs did  
4 not want any questions about substance abuse; is that correct?

5 MR. STRANCH: We do have questions that get at that  
6 issue. We ask, for example, have you ever been diagnosed with  
7 cirrhosis of the liver.

8 THE COURT: Right, but that's rather far down the  
9 line --

10 MR. STRANCH: Yes.

11 THE COURT: -- in terms of alcohol abuse.

12 MR. STRANCH: Yes. We don't believe that the  
13 questions that they had proposed were necessary. We have  
14 questions about tobacco use and we ask about that, and we ask  
15 how long they've been using the tobacco products for that. We  
16 ask about the cirrhosis of the liver. We do not have a  
17 specific question that says, How many drinks do you have a  
18 day? How many drinks do you have a week? Because, frankly,  
19 there's no scientific evidence that's been put forward to us  
20 that would make that relevant.

21 We've asked -- and we've just been told, Well,  
22 everybody knows alcohol use is important. And that's not  
23 sufficient to do it. They need to provide some sort of  
24 information that makes it relevance. So, if a person drinks  
25 one glass of wine every day with dinner, they need to show how



1 that's related to causation or how that's related to damages,  
2 and that's not been done.

3 The reason we left cirrhosis in, your Honor, is to  
4 catch those people that had already progressed to a point  
5 where they've done basically irreversible damage to their  
6 bodies through alcohol consumption or potentially through  
7 other means that have caused it, but that's the key there.  
8 And so, that's what you need to know because that's the point  
9 at which you have the significantly-shortened life span or  
10 other things that would change the actuarial tables for you.  
11 So, that's why we've proposed that.

12 And, additionally, your Honor, if there is a concern  
13 with the alcohol use such that it would affect their medical  
14 health, it's going to be within the medical records, because  
15 we're giving them all of the medical records so they can look  
16 through it.

17 THE COURT: All right. And then -- but I believe in  
18 terms of the mental health treatment, which is perhaps another  
19 area where that may show up, if I remember correctly, the PSC  
20 form does not require the plaintiffs to provide dates of  
21 treatment or the treatment provider's address.

22 MR. STRANCH: That is incorrect. What we've said is  
23 if you're raising a claim for emotional distress or any sorts  
24 of mental healthy damages and you have sought medical  
25 treatment for it -- and we say, for example, with a therapist,

1 a psychiatrist, a hospital, an in-patient facility, just as an  
2 example, not as a limitation -- then you have to fill out a  
3 separate form that discloses that information, list who the  
4 providers are so they can go get it.

5 Where we have drawn a line in the sand, your Honor,  
6 is we've said sexual abuse records are not appropriate and  
7 we're not going to agree to turn those over for every single  
8 person, but what we're willing to do is if they want -- if  
9 they can make a showing that they're somehow relevant to any  
10 single plaintiff's case, we're willing to consider that  
11 showing and to meet and confer with them on that, but we  
12 believe that is highly, highly intrusive with no relevancy  
13 whatsoever at this stage for Bellwether production, your  
14 Honor, and we believe it's highly unlikely that it would ever  
15 be appropriate in the case, but we've left the door open to  
16 consider that on a case-by-case basis.

17 THE COURT: All right. And then I might -- it's a  
18 lot of the same arguments, so I think I'll also give you the  
19 questions now for the releases.

20 MR. STRANCH: Sure.

21 THE COURT: So, with respect to the employment  
22 releases, it's my understanding that the plaintiffs' release  
23 does not include worker's compensation claims; is that right?

24 MR. STRANCH: Your Honor, what we've said is for the  
25 employment records, any and all personnel records, employment

1 applications, job descriptions, payroll, salary records,  
2 letters of commendation, discipline, performance evaluations,  
3 and other things, there is a separate disability insurance  
4 award that would go through there, and we've also said in the  
5 form provide a list of any awards that you received for  
6 worker's compensation, so that they would know what the awards  
7 were and what the disability was.

8 THE COURT: But the release wouldn't authorize any  
9 communications?

10 MR. STRANCH: Yes. It's -- Exhibit 7, I believe,  
11 your Honor, is authorization for release of worker's  
12 compensation awards.

13 THE COURT: And that one is limited -- right. So,  
14 you have a release to worker's compensation, but not for the  
15 employer's records on worker's compensation; is that right?

16 MR. STRANCH: The release for the award -- for the  
17 worker's compensation award, this is to whoever the award was  
18 against so that they can release those records.

19 THE COURT: And that one is only for permanent total  
20 disability or permanent partial disability; is that right?

21 MR. STRANCH: That is correct, your Honor.

22 THE COURT: Why is it limited in that way?

23 MR. STRANCH: Well, for example, your Honor, in the  
24 worker's compensation scheme, if I fall off a ladder and break  
25 my arm and I heal completely and have no permanent disability

1 from it, it's not relevant to anything. There's no relevance  
2 whatsoever. If that happened in 1985, why do we need that?  
3 It doesn't help with the Bellwether selection at all.

4 What does help and what we do think is relevant and  
5 what we have agreed upon is if a court or -- either through  
6 settlement or through trial has found that you are 15 percent  
7 permanently disabled or 100 percent permanently disabled, we  
8 think that's relevant to your damages and we think it's also  
9 relevant potentially to Bellwether selection process, but if  
10 you had no permanent disability or partial permanent  
11 disability; in other words, it resolved itself completely,  
12 then we don't think there's any relevancy whatsoever.

13 THE COURT: And I don't believe the plaintiffs have  
14 put forward a separate insurance authorization.

15 MR. STRANCH: Insurance?

16 THE COURT: Insurance company authorization.

17 MR. STRANCH: For their medical records?

18 THE COURT: Yes.

19 MR. STRANCH: We've said that they can get all the  
20 records from the providers, which would include the insurance  
21 billing information --

22 THE COURT: Right. So, for example, the Tennessee  
23 and St. Thomas groups, I think it's Tab E, have a separate  
24 insurance authorization, and there's no such separate  
25 insurance authorization from the plaintiffs.

1 MR. STRANCH: Your Honor, we don't believe that  
2 that's necessary.

3 THE COURT: So, that's my question. Why?

4 MR. STRANCH: We don't believe that's necessary for  
5 the Bellwether selection process because they're already going  
6 to have all those records themselves. They're going to have  
7 the records saying --

8 THE COURT: The individual plaintiffs will have those  
9 records?

10 MR. STRANCH: No. The defendants will have those  
11 records. St. Thomas billed the insurance carriers and were  
12 paid by it. So, they will have the records to show them what  
13 was done. In Tennessee when you file a notice --

14 THE COURT: But they'll only have the records for  
15 their treatment.

16 MR. STRANCH: Well -- I'm sorry, your Honor, let me  
17 back up.

18 In Tennessee when you file one of these claims, you  
19 have to provide a notice beforehand which includes medical  
20 records, releases for all of your treatment that you received  
21 as a result of the injury.

22 THE COURT: But don't we have more than just  
23 Tennessee plaintiffs?

24 MR. STRANCH: Yes, we do, your Honor. We do have  
25 more than that. And most states, as I understand it, require

1 some sort of similar process, not all of them, but you'll  
2 get --

3 THE COURT: I could be wrong. I don't think that's  
4 required in Massachusetts.

5 MR. STRANCH: Okay. But when they get the records  
6 from the hospital where the person received the treatment,  
7 billing records are going to be a part of that which are going  
8 to include the insurance records. And so, they will get what  
9 the insurance company was billed and what the insurance  
10 company paid for on it already.

11 MR. GASTEL: Your Honor, Ben Gastel on behalf of the  
12 plaintiffs.

13 There might be a disconnect here. Are you talking  
14 about medical records insurance or disability insurance?

15 THE COURT: Medical records insurance.

16 MR. GASTEL: Okay. Thank you, your Honor.

17 THE COURT: All right. So, is there anything else  
18 you would like to add or I can move on to my questions to St.  
19 Thomas and Tennessee?

20 MR. STRANCH: Unless you have anything else to ask,  
21 your Honor, I'm happy to rest subject to rebuttal.

22 THE COURT: All right. So, who is going to speak for  
23 -- do you want to move up to the table?

24 MS. KELLY: Counsel on the phone are going to handle  
25 this.

1 MS. GREER: Your Honor, we're by phone, but I believe  
2 -- this is Marcy Greer on behalf of the St. Thomas entities.  
3 Can you hear me okay?

4 THE COURT: Yes.

5 MS. GREER: And I believe that Chris Tardio is also  
6 on the phone.

7 (Discussion off the record at the bench.)

8 THE COURT: And the court reporter has asked if Marcy  
9 Greer could speak up.

10 MS. GREER: Okay. Is this better? I apologize, your  
11 Honor. We tried to be there, but our flights were cancelled.

12 THE COURT: All right. Go ahead.

13 MS. GREER: Can you hear me now?

14 THE COURT: Yes.

15 MS. GREER: Okay. Good.

16 THE COURT: Did you want to say something before? I  
17 have a number of specific questions.

18 MS. GREER: If I could just briefly touch on a couple  
19 of overarching issues that came up in Mr. Stranch's argument.

20 The first is that the purpose of the fact sheet, as  
21 we have made clear in our papers, is not just for selecting  
22 Bellwether. It's also for obtaining these records before they  
23 get lost forever. The fact sheet and the authorization kind  
24 of go hand in glove because the fact sheet gives us the  
25 information so that we can make sure we've got the medical

1 records. That is necessary because, yes, you know, we agree  
2 that not all these cases are going to go to trial, but some of  
3 them are and none of us sitting here today know which cases  
4 those are, and that's why it's important for us to gather the  
5 medical records.

6 The issue is not relevance. They keep saying we have  
7 to prove it's relevant somehow to the Bellwether issue. There  
8 is no caselaw to support that and that's not the test.

9 There's really not much of a question. Every bit of  
10 information that we're requesting on our proposed fact sheet  
11 would be relevant and would be discoverable if this were a  
12 single-plaintiff case, but what they're trying to do is  
13 basically usurp the role of the Court by deciding what's  
14 relevant in advance and tying it to this limited understanding  
15 of the Bellwether process. Again, we're trying to make sure  
16 that both functions of the fact sheet are fulfilled here and  
17 that's why we've asked the questions.

18 We have made significant progress in cutting it down.  
19 As the Court can see from our Exhibit M, we've gone back to  
20 the drawing board and tried to give up on as much as we can to  
21 streamline this process and get it to the next level, but the  
22 records are very important and we have to have the background  
23 information so that we can find it. They say things like  
24 addresses going back ten years are not relevant. Well, they  
25 are because that's how we make sure we get the records. This



1 is our one chance to have these people fill out a form.

2 And, again, they talk about all the attorney time and  
3 all the difficulty here. These are forms that people are  
4 going to know off the top of their head. I mean, I think most  
5 people know their Social Security number, and going to -- who  
6 they've seen going to the doctor, et cetera. They know  
7 whether they've been diagnosed with cirrhosis or not. It's a  
8 simple check yes or no or I don't know in cases.

9 So, they're not having to compile any of these  
10 records, just a very few at the end that we've asked for, and  
11 we can talk about that later, but the point is, is that they  
12 sit down and fill out this form just like they would at the  
13 doctor's office for a new-patient visit, and then we go get  
14 the records, and that burden on them to ask a few extra  
15 questions to help us get to the point where we can find out  
16 the information we need, we submit, is not significant in  
17 light of the importance of gathering these documents, because  
18 the reality is that trials are going to be taking place if  
19 this plays out like a lot of MDLs have for years to come and  
20 if we haven't gathered the records now -- what if we don't get  
21 all the records for a certain person. Then six years now or  
22 five years from now or heaven forbids later, those records may  
23 be gone, not available.

24 So, that's why we have asked the questions. We've  
25 tried to be very fair and faithful to fact sheets that were

1 used before. We've provided the Court with a lot of guidance,  
2 and I'm happy to answer specific questions, but I did want to  
3 give the Court the benefit of that overview.

4 THE COURT: All right. Thank you.

5 So, why are sexual abuse records relevant at all and,  
6 in particular, for this stage of the proceedings?

7 MS. GREER: Your Honor, we are prepared to give up on  
8 sexual abuse records. Our concern is that it was presented in  
9 an extreme example, but it was used by PSC to argue that we  
10 shouldn't get psychological records unless there was treatment  
11 for a psychological issue.

12 In the real world, that doesn't always happen. In  
13 the real world, there may be psychiatric or psychological  
14 issues that appear in marital counseling and under their  
15 version, we wouldn't get those records because the person went  
16 in for marital counseling and not psychological or psychiatric  
17 treatment. That's our concern.

18 If they want to carve out for just sexual abuse  
19 records, we can do that, but we don't want the carve-out to be  
20 so broad and it was always joined with the rest of the  
21 records, that we fail to get psychological records, because  
22 there are a lot of patients here who are claiming fear claim  
23 and if their claim is solely exposure and fear of contracting  
24 meningitis, then we need to get those psychological records.  
25 They're going to be very important.

1 THE COURT: And then the family medical history  
2 questions also seemed quite detailed and while I could  
3 understand a case being made for relevance, again, my question  
4 is why at this stage?

5 MS. GREER: Well, the issue here is acuity. They  
6 talked about things like product I.D. I don't think those are  
7 going to be big issues in this case for obvious reasons.  
8 These are prescription drugs, et cetera, but things like  
9 acuity are very compelling in this case. Why -- a lot of  
10 people were injected with these steroids, yet only a few ended  
11 up getting sick. Why is that? There's no pattern that we've  
12 been able to see.

13 And so, we are asking for history really on things  
14 like historic family information that you would know. You  
15 know, did your father have heart disease? I mean, that's  
16 really all we're asking. And autoimmune and immunity are the  
17 disorders we think will play a significant role in this. And  
18 so, that's the function of those questions.

19 If you go to the doctor's office, those are on every  
20 new patient form. Have you ever had a history of, list all  
21 these things in your family.

22 THE COURT: And moving on to the authorizations. Why  
23 do you need authorizations for educational records?

24 MS. GREER: We typically get those at this point.  
25 Again, this is the function not for purposes solely of the

1 Bellwether, but for purposes of gathering the records so that  
2 we have them. This is not an MDL with thousands or millions  
3 of plaintiffs. This is a little over 100 for the St. Thomas  
4 entities, and right now we're the active cases. There's no  
5 reason not to go gather these records now if there's no burden  
6 on the plaintiff. All they have to do is sign the form, and  
7 they have put it at issue by bringing the claim. Again, if  
8 this were a single-plaintiff case, we wouldn't even be having  
9 this discussion. They would just have to sign them.

10 THE COURT: And I don't believe the defendants put in  
11 a counter tax return release. I believe the plaintiffs used  
12 the IRS form. Is there -- I think there may be some dispute  
13 as to the timeframe, but no one is objecting to the form; is  
14 that correct?

15 MS. GREER: We are not. And, your Honor, that was an  
16 oversight. One of our filings did, in fact, have the tax form  
17 and I think it just got left off of this one, but we agree  
18 that we do need the tax form and we're fine with all of that  
19 subject to time.

20 THE COURT: All right. Anything else?

21 MS. GREER: That's all I have. I think Mr. Tardio  
22 has some comments.

23 MR. TARDIO Your Honor, this is Chris Tardio with  
24 Nashville. I represent St. Thomas Outpatient Neurological  
25 Center and various other Tennessee defendants.

1           We filed a proposed fact sheet which is similar to  
2           the one St. Thomas filed, but with some -- I think it strikes  
3           more of a middle ground on some of the specific questions.

4           I don't have anything to add to what Ms. Greer said  
5           about the relevance at this stage of the family medical  
6           history information, and I'm also willing to build in a  
7           carve-out for sexual abuse records. So, I don't have anything  
8           substantive to add to what Ms. Greer said other than to inform  
9           the Court that overall on some of these specific issues, like  
10          substance abuse, we spent a good bit of time trying to build a  
11          form that struck a middle ground between the plaintiffs' form  
12          and the St. Thomas form and took into account both the PSC's  
13          concerns with the intrusiveness of the questions and our need  
14          for the information at this stage of the proceedings.

15          THE COURT: All right. Thank you.

16          Anything further from the plaintiffs on this issue?

17          MR. STRANCH: Yes, your Honor. I have a couple of  
18          things that I want would like to talk about briefly.

19          We've heard today for the first time throughout the  
20          70 odd days that we've been negotiating over this that the  
21          real reason is an attempt to preserve records.

22          Your Honor, I think that should ring false, you know,  
23          because if there's a real concern about preserving records,  
24          then, at a minimum, plaintiffs should be getting records that  
25          we've been requesting since October from the defendants.

1           Secondarily, there are statutory obligations on  
2 hospitals and clinics to maintain records. And so, hospitals  
3 don't just throw them away if they don't see a patient for 30  
4 days or 40 days or 60 days. In fact, if you talk to any  
5 physician, they're going to tell you one of the most important  
6 things they can have with their patients is that detailed  
7 history that goes back for years and years, and they build it  
8 up so that they can treat the patients. The records are  
9 there. They're not going to be destroyed. And so, I think  
10 that should ring hollow and I think it's a waste of everyone's  
11 time and effort at this point in the Bellwether selection  
12 process.

13           And one issue we still do not know, despite this  
14 Court's order to respond to document requests through the  
15 subpoenas that were served earlier, we still don't know if the  
16 entities opposing this have wasting policies that are taking  
17 money away from the potential plaintiffs at the end of the  
18 day. We don't know that. And so, this could be literally  
19 taking money away from the plaintiffs and putting it into the  
20 defense lawyers' pockets.

21           Secondly, your Honor, you heard that the family  
22 medical conditions are necessary to determine causation  
23 because some people may be more susceptible to infections  
24 through MPA. I cannot for the life of me see how my  
25 grandfather's HIV status or my children's HIV status has any

1 bearing on whether I contract a disease when I receive a shot  
2 or not. There's no relevance whatsoever.

3 We have agreed to produce the records as it relates  
4 to the person who was injured. Do they have an autoimmune  
5 disorder? Do they have HIV? Do they have AIDS? We've agreed  
6 to produce those. That's what's needed to determine causation  
7 and whether they may be more susceptible or less susceptible.  
8 Siblings' records and grandparents' records, parents' records,  
9 children's records, all a complete fishing expedition, no  
10 relevance to causation whatsoever, your Honor, and it's  
11 incredibly burdensome and it invades the privacy of those  
12 individuals.

13 In fact, looking through the law, we believe we are  
14 prohibited from providing it under many states' laws and  
15 there's also a problem under HIPAA for the parents to do it on  
16 behalf of the children or for grandparents or others that they  
17 may hold medical power of authorities for because they may be  
18 violated HIPAA by providing that --

19 THE COURT: Actually, you've reminded me of a  
20 question. I had understood from your submission that you want  
21 the medical records to go to a HIPAA-compliant vendor. And  
22 then I believe the defendants suggested in some way that you  
23 were going to screen them first, but I can ask the defendants  
24 after this, but my understanding, at least with the medical  
25 records, is that you want them to go to the HIPAA-compliant

1 vendor.

2 MR. STRANCH: Your Honor, we have asked that they go  
3 to the HIPAA-compliant vendor and we would offer to screen  
4 them before they went to make sure that anything that was in  
5 there that was not responsive, for example, any sexual abuse  
6 or any other things would be removed from that. We've  
7 actually worked through that issue.

8 THE COURT: Okay.

9 MR. STRANCH: And so, we don't believe that's a  
10 problem anymore.

11 THE COURT: All right. Thank you.

12 Anything else? Yes. I believe the gentleman behind  
13 you wanted to speak as well.

14 MR. ZAMORA: I'll wait for Mr. Stranch to complete.

15 MR. STRANCH: Okay.

16 MS. GREER: Your Honor, may we be heard?

17 THE COURT: Yes. What I would like to do first is  
18 why don't we finish up with the PSC and then I'll hear from  
19 the other gentleman in the courtroom and then I'll come back  
20 to you.

21 MR. STRANCH: And the one last thing I wanted to hit,  
22 your Honor, was there was a suggestion that we have not raised  
23 an issue with the relevance -- ultimate relevance of any of  
24 the information that they've requested in the plaintiff fact  
25 sheets.



1           I think we've demonstrated here today that there are,  
2     in fact, things that we do object to ultimately coming into  
3     the record or being discoverable at any point in the  
4     litigation, like the family medical histories, you know. We  
5     think, for example, that if you're not making a lost wage  
6     claim, they don't need to get your employment information.  
7     They don't need any of that.

8           So, we do think that there are some issues like that.  
9     And the way we've dealt with those, your Honor, is we've said,  
10    in an effort of compromise, we're not going to give it to you  
11    now, but once you have the information from that person, if  
12    you believe it's relevant and can make a showing, we would be  
13    happy to meet and confer with you and discuss it and consider  
14    it by on a case-by-case basis and if it's relevant, we'll give  
15    it to you if we agree and if not, then it's a discrete issue  
16    that can be put to the Court quickly and simply.

17           THE COURT: Thank you. Yes.

18           MR. ZAMORA: Your Honor, Mark Zamora for the  
19    plaintiffs' steering committee.

20           Your Honor had asked a few questions early on in the  
21    process about substance abuse. And so, I was referring to Ms.  
22    Greer's submission, Questions 41, 42, 43, which I think goes  
23    to the heart of use, and I think your Honor aptly noted the  
24    critical distinction that we're going to have if questions go  
25    to this in any fact sheet that's approved by the Court.

1           What's instructive for us, if you look at the  
2       submissions from the defendants, they rely upon the Yaz filing  
3       as, in essence, the basis for those types of questions.

4           So, when you look at the product itself, what's  
5       important to recognize in the Yaz litigation, for example,  
6       smoking was a key factor that related to a number of the  
7       questions of injury involved in that case. Here we don't have  
8       that. Even if you presume for the sake of our discovery that  
9       there is some relevance to it, you'll note in the Yaz case, it  
10      was limited by time to three years of smoking.

11          You then discuss alcohol abuse in Yaz which may have  
12      had a compounding effect on clotting or DVDs in that case,  
13      which was limited to one year of use, but when you look at  
14      defendants' own filings, your Honor, and you especially look  
15      at the study that was performed that was written up on fungal  
16      meningitis and how rare it is of a human pathogen, nothing in  
17      that science that they submitted suggests any reason or basis  
18      to ask for this type of information.

19          And there's something that's really important for  
20      your Honor to -- I think you picked up on the nuisance -- was  
21      of use. They asked for use. Not only do they ask for use,  
22      they go much further than any filing on a case that is similar  
23      to this by asking for ten years.

24          So, if there is to be some type of revision or  
25      compromise in a sense to get to the truth of the plaintiffs'

1 case, I think you aptly noted by saying "of use." And so, the  
2 question of simple use nine or ten years ago will lead to  
3 nothing other than folks saying why in the world are they  
4 asking for -- explain how -- why I had a glass of wine nine  
5 years ago.

6 The second component, your Honor, which is really  
7 instructive -- and I'm done after this -- asking for the  
8 medical records. There's an old saying that everything is  
9 related to everything.

10 When you look at the fungal meningitis study that was  
11 submitted, your Honor, most of these cases the mean age is 69.  
12 So, they're asking for high school records going back 45 to 50  
13 years, and I think you can predict what's going to happen when  
14 those requests are made. We don't have them. So, we'll be  
15 back stuck in the muck and the mire asking for 45-year-old  
16 educational records.

17 Simply asking for them without a showing of saying  
18 anything more than, We need them, is not sufficient in the  
19 context of this litigation and the injuries that are alleged.

20 And there's more than just a few. There's more than  
21 65 -- I think Ms. Greer said only a few got sick, and I think  
22 I speak for all the defendants' lawyers in this room. When  
23 there are more than 60 deaths and more than 700 injuries, it's  
24 more than just a few people got sick. So, I think you judge  
25 the submissions by their relevancy to fill the pool for

1 Bellwether selection.

2 THE COURT: Thank you.

3 Counsel on the phone, anything further?

4 MS. GREER: Yes, your Honor.

5 First of all, with the issue of preservation and the  
6 role of fact sheet in gathering records, we have raised this  
7 in several hearings and it's been in both of our papers  
8 relevant to this, that there are twin purposes of the fact  
9 sheet and that the PSC has focused on solely the Bellwether,  
10 but this does not come to them by surprise.

11 With respect to records, we're only seeking to go  
12 back ten years. We're not seeking to go back in time ad  
13 infinitum, but we think ten years is really important,  
14 especially as to the medical records, because you need that  
15 information to show trending and, as the Court can see in all  
16 the fact sheets that we submitted from other cases, they go  
17 back ten years, some cases 20, and some for life, but we've  
18 asked for ten, which we think is very reasonable under the  
19 circumstances.

20 The decision -- the issue of preservation and what  
21 the law provides for hospitals, that's not the issue. We've  
22 got our records and they have been preserved. The issue is  
23 the treaters, the physicians who are not subject to the same  
24 records.

25 We're trying to get a wholistic health history. They

1 want to keep us to just the records relating to the injections  
2 and the subsequent treatment, and we need a more complete  
3 health history to be able to evaluate these plaintiffs for  
4 Bellwether and also to make sure that the records are  
5 preserved if that case ends up being the one that goes to  
6 trial.

7           With respect to employment records, we've tried to  
8 make it clear repeatedly that we are not seeking employment  
9 records unless the plaintiff has put that issue into the  
10 lawsuit by seeking claims under that. It's simply a red  
11 herring for them to keep bringing it up.

12           As to the substance abuse issue, we are looking for  
13 abuse, but we're also looking for heavy use. They said that  
14 there's no science to support heavy use of alcohol. Well, the  
15 FDA is requiring warnings on Tylenol and Motrin that if you  
16 drink more than three alcoholic drinks a day, you may be  
17 subject to liver damage. So, there is reason to ask those  
18 questions.

19           And it's not limited to just the Yaz litigation.  
20 Every single fact sheet that we submitted asks questions about  
21 tobacco use, not just if they're using it currently, but if  
22 they have used it in the past. If someone smoked for 30 years  
23 and then quit two years ago, that's relevant.

24           I think the Court should be aware that many of these  
25 patients have strokes as part of the meningitis complications

1 and strokes have many, many different etiologies and we need  
2 to explore that to understand why some of these patients got  
3 sick.

4 I did not mean to suggest that there were only a few  
5 patients who got sick. I was suggesting only that of the  
6 percentage of patients who were exposed to these steroids, not  
7 all of them got sick. A smaller percentage got sick. And so,  
8 we want to find out what it is that caused those patients to  
9 get sick and not others. Some of that is outlined in the New  
10 England Medical Journal article that we submitted to you, but  
11 they agree that this is something that needs to be studied  
12 further.

13 As to the repository, there are two issues on that.  
14 One is access and one is dollars, because the access issue in  
15 our mind is by far the most important. I'm not sure where we  
16 have resolved this. I certainly haven't seen anything in  
17 writing that would suggest that the PSC is not going to try to  
18 screen these documents ahead of time to determine what's  
19 relevant. That was said in a -- in a meet-and-confer, but I  
20 don't have anything to back it up.

21 There's just no precedent that the PSC would get to  
22 be the gatekeepers here and make the relevancy determinations  
23 that are for this Court to make.

24 And then there's also the issue of dollars, that they  
25 want to charge money for us to access this repository once the

1 records are compiled, and we're simply trying to say there's a  
2 way to do it. It's been done in hundreds, if not thousands,  
3 if not millions of cases. You send the medical authorization  
4 to the third-party healthcare provider and they produce the  
5 record. If there is an issue, the other side can object and  
6 we deal with it at that point on a case-by-case basis.

7 Again, we're talking right now about a little over  
8 100 plaintiffs, which is a lot of plaintiffs, but it's by no  
9 means the thousands of plaintiffs that were implicated in the  
10 Yaz litigation and some of these other cases where they have  
11 used more truncated forms.

12 THE COURT: All right. Anyone else on the phone wish  
13 to speak?

14 MR. TARDIO Your Honor, this is Chris Tardio again on  
15 behalf of the Tennessee defendants, and I won't address all  
16 the points that have been raised at this point or rehash any  
17 of the arguments because it's not worth the Court's time.

18 However, I do want to address specifically two  
19 points. One is substance abuse, which seems to have been a  
20 focus thus far of our discussion, and I respectfully direct  
21 the Court to our proposed form, 41 through 43, or Question 41  
22 through 43, where we attempted to weed out occasional users of  
23 alcohol and attempted to ask such that only identifies  
24 abusers. So, we did try to strike a middle ground on that  
25 question to lessen the intrusion on the plaintiffs filling out

1 the form.

2           The second point I did want to make on the loss of  
3 consortium question, which we included in our form, and I  
4 believe it's a perfect illustration of what we tried to do,  
5 spending hours literally on our form, simplifying the  
6 questions to make it such that the burden on the person  
7 completing the form, not the lawyer, but the person, the  
8 plaintiff who is actually going to be completing the form, the  
9 burden is low. It's a simple question that can be answered  
10 from memory, but the yield of information is high. So, we've  
11 tried to balance throughout the form the burden on the  
12 plaintiff completing the form with the potential to yield  
13 important information to select representative cases and,  
14 probably more importantly, to weed out non-representative  
15 cases.

16           THE COURT: All right. Thank you. So, I'll take  
17 this issue under advisement. Yes.

18           MS. PARKER: If I may, your Honor. I just have two  
19 pieces of information that I thought may be helpful to the  
20 Court.

21           The first is that reference has been made to a  
22 HIPPA-compliant vendor, and just to let the Court know, that  
23 earlier in this litigation the PSC retained an established  
24 HIPPA-complaint repository. The vendor there is Omni Rust.  
25 That was established by a court order earlier in this case and



1 that vendor is -- just to give context for it, that's an  
2 existing vendor that is already performing functions related  
3 to this litigation.

4 And the second is to let the Court know that the PSC  
5 has filed a discovery and trial plan, proposed only, that  
6 contemplates a trial of the St. Thomas action in the spring of  
7 2015 and that proposed -- that's Dockets No. 837 and 838 in  
8 the MDL docket. That proposed schedule contemplates a  
9 relatively quick resolution of this and other discovery issues  
10 so that the parties may move forward, and I share that with  
11 your Honor only because I know sometimes it's helpful to have  
12 a larger context for how these discovery battles fit into the  
13 litigation plan.

14 THE COURT: All right. Thank you.

15 And in accordance with that, I also have -- what I  
16 had understood Judge Saylor to refer to me was the  
17 determination of the content of the plaintiff fact sheets,  
18 authorizations to release records and protective orders. I  
19 don't see -- and perhaps I missed that there are any  
20 protective order requests. I know there have been some  
21 already issued in the case.

22 MR. STRANCH: Your Honor, there was a dispute over  
23 the protective order. There was an attempt to modify that.  
24 Judge Saylor dealt with that by order shortly after the  
25 referral to this Court. And so, we believe that that issue

1 has been resolved.

2 THE COURT: All right. And then the other issues  
3 that I believe only the plaintiff addressed, which I'm not  
4 clear are squarely before me, are the deposition protocol and  
5 then also the protocol for electronic discovery.

6 MS. PARKER: Yes, your Honor. So, the plaintiffs'  
7 steering committee had provided drafts of the agreement and  
8 attempted to meet and confer on them with the defendants,  
9 including the St. Thomas defendants.

10 We included our proposed versions of these in our  
11 latest submission before this Court. Admitted entry for last  
12 month's status conference as entered today we think gives us  
13 further guidance that we should propose those to the Court  
14 generally in the form of a motion rather than having included  
15 them here. So, our intention is to file a motion for entry of  
16 the ESI protocol and deposition protocol.

17 THE COURT: So, I will not ask you any questions  
18 about them.

19 MS. PARKER: We are prepared to discuss them if your  
20 Honor would like to, but that was our understanding how to  
21 move forward.

22 THE COURT: All right. Is there anything else from  
23 the plaintiffs' side at this point?

24 MR. STRANCH: The only thing we would say, your  
25 Honor, is --

1 THE COURT: You just need to pull the microphone.

2 MR. STRANCH: The only last thing we would say is on  
3 the plaintiff profile forms, you know, the *Granuflo* case we  
4 think would be instructive for the Court to look at. We've  
5 attached that to ours. We've also referenced it. That's in  
6 this district. We believe the Court should take a look at  
7 that. In particular, the releases there are limited to three  
8 years instead of the longer period.

9 THE COURT: All right. Any one else in the courtroom  
10 wish to speak to anything?

11 (No response.)

12 THE COURT: Anyone on the phone?

13 (No response.)

14 THE COURT: All right. Thank you very much.

15 COURTROOM DEPUTY CLERK YORK: All rise. Court is in  
16 recess.

17 (Adjourned, 11:25 a.m.)

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## C E R T I F I C A T E

I, Catherine A. Handel, Official Court Reporter of the United States District Court, do hereby certify that the foregoing transcript, from Page 1 to Page 51, constitutes to the best of my skill and ability a true and accurate transcription of my stenotype notes taken in the matter of Civil Action No. 13-02419-FDS, In Re: New England Compounding Pharmacy Cases Litigation

February 9, 2014  
Date

/s/Catherine A. Handel  
Catherine A. Handel RPR-CM, CRR